

**Letter of Findings Number: 09-0981P
Sales and Use Tax – Negligence Penalty
For the Periods 2006-2008**

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ISSUE

I. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is a company doing business in Indiana. The Indiana Department of Revenue ("Department") audited Taxpayer for sales and use tax for the years 2006 to 2008. As a result of the Department's audit, the Department issued proposed assessments of use tax, interest, and penalties. Taxpayer protested only the penalties.

I. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer protests the imposition of the ten percent negligence penalty on the use tax imposed as a result of the Department's audit.

Penalty waiver is permitted if the taxpayer shows that the failure to pay the full amount of the tax was due to reasonable cause and not due to willful neglect. IC § 6-8.1-10-2.1. The Indiana Administrative Code, [45 IAC 15-11-2](#) further provides:

(b) "Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

(c) The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer presented two separate arguments in its protest. First, Taxpayer argued that this is the first time it had been audited with regard to the use tax issues raised in this protest. While Taxpayer's statement is correct, over eighty-five percent of the assessment was the result of lump-sum real estate improvement contracts on which Taxpayer neither charged sales tax on the sale nor remitted sales tax on materials at the time of purchase. This failure occurred despite long-standing Departmental guidance (for instance, the Department's regulations on this issue were promulgated in 1982) on the sales and use tax duties and obligations of construction contractors.

Taxpayer further asserts that it hired a new controller and established improved sales and use tax accrual procedures. While the new controller may prevent future problems, the new controller's hiring—which occurred in early 2009—does not explain the issues related to 2006 through 2008. Based on the failure to follow long-established Departmental guidance on the matters subject to the use tax assessment, Taxpayer has not demonstrated reasonable cause sufficient to justify penalty waiver.

FINDING

Taxpayer's protest is denied.

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